PRIVACY JOURNAL

an independent monthly on privacy in a computer age

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HOW MUCH IS PRIVACY WORTH TO YOU?

"A federal judge has decreed -- at least for now and perhaps for good -- that a citizen's right to privacy is worth a dollar." That was the reaction of The New Yorker (Aug. 22) to federal judge John Lewis Smith Jr.'s award of $1 each to former Kissinger aide Morton Halperin and his family after 18 months of an illegal wiretap on their home telephone by the Nixon Administration. Halperin v. Kissinger et al, C.A. No. 1187-73 (D.D.C.). The federal law violated by the Nixon Administration tap calls for damages of at least $100 for each day that an illegal tap is in place.

Attorney General Griffin Bell has another method for measuring the worth of an individual's right to privacy. Faced with a decision of whether to approve indictments of high FBI officials who conducted unauthorized and illegal break-ins, wiretaps, mail-openings and other invasions of privacy, Bell consulted his fan mail. He reluctantly agreed to the indictment of one agent named by a grand jury last spring simply because the statute of limitations on the offense was about to expire. "The mail against me was a hundred to one. And the last time we checked I was losing the one," said Bell earlier this summer in explaining why he chose not to approve other indictments, even though the evidence was clear that the violations had not had the approval of FBI top management nor existing law. (See June 1977.)

The FBI took no disciplinary action. Its assessment of an individual's right to privacy is different. Its Office of Professional Responsibility concerned itself in the past year with such "major offenses" as, "A special agent voluntarily admitted having an extramarital relationship....The agent's field office initially recommended censure, probation, and five days suspension. (Headquarters) agreed with the field office recommendations but added that the agent should be transferred to another field office and be relieved of his supervisory duties." Another special agent accused of (but not admitting) extramarital affairs, physical abuse of his wife, falsifying expenses and several breaches of security received a lesser penalty. This was reported in a critique of the FBI's internal inquiries into alleged improprieties by its own staff, by Victor L. Lowe of the General Accounting Office before the House Subcommittee on Government Information and Individual Rights July 21.

A federal judge in New York City measured privacy damages in a different way from his colleague in the Halperin case. He made the punishment fit the crime. Judge Jack B. Weinstein ordered the government to write letters of apology to three persons whose mail had been opened by the Central Intelligence Agency. The

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Oops -- Of more than 19,000 HEW employees who asked to correct their own files, as permitted under the Privacy Act, 99 percent were entitled to a correction or amendment to the files. Under HEW privacy regulations, the department must make a correction "if the responsible offical agrees that the record is not accurate, timely, or complete (or) not relevant or necessary." The same is true in other departments; just about all requests to see one's own file come from federal employees and just about all requests for correction are approved. With the exception of those seeking FBI files, the general public "did not exercise their rights of access as anticipated" in 1976, according to Second Annual Report of the President on Federal Personal Data Systems (Stock Number 041-001-00154-9, Government Printing Office, Washington, D.C. 20402). Few citizens are commenting on the hundreds of public notices that must be published under the act, and the privacy act has reduced slightly the total number of federal files on people and improved the quality of that data, according to the report.

You Deserve a Byte -- If you let your kid sign up for the Ronald McDonald Birthday Club, you should know what happens. His or her name gets entered into a computer in Baltimore. To handle more than 100,000 applications every month, McDonald's codes each one of them on computer tape so that each kid's birthday is noted and he or she receives one of eight possible free food offers selected by the store manager.

One Congressman, who would understand all of this, was asked how he used the yearly $12,000 in computer services he is entitled to in the House of Representatives. "To make correspondence to my constiuents more personal," he said.

IN THE STATES

California's SB 170, fair information practices code for state agencies drafted by civil libertarians, has been approved by the State Assembly after amendments recommended by Gov. Edmund G. Brown Jr.'s administration. This is an updated version of a bill that Brown has twice vetoed, but he has indicated he will sign SB 170 if it passes the State Senate. It would limit disclosure of state manual or automated files about individuals and permit a citizen to inspect and correct records about himself. The governor's aides successfully asked that the bill be amended to establish an Office of Information Practices, with which each state agency would file notices of its personal data systems. Brown had complained that earlier proposals would require too much paperwork and so he signed an executive order last October that grants many of the rights established by SB 170. Many of the administrative requirements formerly in the bill have been eliminated at the request of the governor's aides. Law enforcement and the university system would be exempt from the limits on disclosure of personally identifiable data. * * * AB 150, a bill drafted by computer professionals to regulate only computer files in government and private business, is pending in the Assembly Ways and Means Committee. AB 150 had been suspended pending release of the federal privacy commission report. It offers the computer professional's idea of what ought to be; SB 170 is an example of the layman's.

QUOTABLE

"I think it's about time they take those cameras off the bank customers and aim them at the bank presidents."

Johnny Carson, The Tonight Show, Aug. 30, 1977, in reaction to the banking practices revealed in the investigation of Bert Lance.

THE CANADIAN HUMAN RIGHTS ACT: AN ANALYSIS

By David H. Flaherty

The new Canadian Human Rights Act is at best a mixed bag. The same statute is designed to extend the present federal laws in Canada that proscribe discrimination and to protect the privacy of individuals.

Part IV of the Human Rights Act (Bill C-25 passed this summer) grants individuals the right of access to federal records containing personal information about them, for any reason including the purpose of ensuring accuracy and completeness. It embodies the principle that the privacy of individuals should be protected "to the greatest extent consistent with the public interest." The typical Canadian limitation incorporated in the last phrase is a portent of what is to come.

Individuals are given a right of access to personal information held about them in government files. The most useful provision requires the annual publication of an index of each federal information bank containing administrative records, which should list the contents of the data files, as well as derivative or routine uses of the information. If American experience under the Privacy Act of 1974 is a reliable guide, this requirement will encourage civil servants to destroy some of the useless banks of personal information that have accumulated over time. The index should also make it easier for researchers to discover just what data some government departments hold. The quality of listings in the index will have to be monitored to prevent the publication of vague listings which are of no use to anyone.

The government will rely on the issuance of regulations to determine what information must be listed in the annual index and what procedures will apply when an individual wishes to examine and correct his personal file. The 89 Departments and government institutions falling within the scope of the legislation will thus have too many opportunities to lessen the impact of data protection.

The quality of the regulations for the implementation of data protection will be crucial to the success of the effort. For example, there are no real controls in the legislation on inter-agency transfers of administrative records under the guise of a derivative use. Citizens are expected to trust the government to act in their best interests.

Personal records are to be used only for the purposes for which they were collected, unless the use is authorized by law or a person has been notified of the derivative use. Individuals also have a right to record corrections of errors in

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government files. American law includes similar provisions.

The privacy section of the act does have some potential for development. The minister designated as responsible for its implementation has to approve any new information banks created by government agencies. Regulations issued under the act can also provide "for the management and surveillance of records of any government institution to promote the protection of individual privacy."

One of the members of the Canadian Human Rights Commission has been designated as the Privacy Commissioner. He is Inger Hansen, Canada's prison ombudsman. This individual can investigate violations of privacy by government information banks and report the findings to the government minister involved and to the complainant. The Privacy Commissioner is also required to make annual or special reports to Parliament.

But the Privacy Commissioner cannot make final determinations. Government ministers retain ultimate responsiblility to Parliament. In the role of ombudsman, the Privacy Commissioner can only publicize government noncompliance with his recommendations. This type of arrangement for a Privacy Commissioner has been employed with some success in the West German state of Hesse.

The extensive exemptions in the statute have attracted the strongest criticism. Data banks do not have to be listed in the annual index or opened to public access if there is any possibility of injury to national security or defense, international relations, federal-provincial relations, or a current criminal investigation. Secondly, there can be no access to a government information bank if there is a potential for injury to any of the interests listed above, or the risk of breach of information concerning another individual. There are additional exceptions in this category.

Although it is obvious that exemptions must exist in some form, the Canadian legislation provides no recourse from "the opinion of the Minister," who makes the determination on access. There is no appeal to a court or to a quasi-judicial body. The Canadian Bar Association wanted the Privacy Commissioner to "have the absolute power to review all exemptions and to review the files which are the subject of these exemptions." The association argued "that the exemptions contained in the bill are so broad that it is difficult to envision an example of a request that could not be denied."

Minister of Justice Ron Basford has made the surprising statement that the protections for privacy in the Canadian Human Rights Act are more effective than those enjoyed by citizens of the United States. He argues that it is better to have elected ministers ultimately responsible for implementation rather than bureaucrats. But the American Privacy Act of 1974 provides for an appeal to the courts in the event that a citizen is denied access to personal information in the hands of the federal government. In addition, American civil servants work within the framework and spirit of a strong Freedom of Information Act which is in direct contrast to the prevailing mentality in Canada both among civil servants and responsible ministers. A strong Freedom of Information Act should be the next item on the government's agenda for the protection of human rights.

At the same time persons concerned with the protection of personal privacy in Canada should be grateful that the enacted version of the government's legislation was so much stronger than the original draft introduced in 1975.

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judge said that the CIA had entered the names of 1.5 million citizens into its computers after learning their identities from the mail opening program, which extended from 1953 to 1973. "The American people have already paid a considerable price for the CIA's illegal mail search activities," he said. The proposed Department of Justice letter of apology said mail openings without court approval had been discontinued and are considered now illegal and that this "will, to some extent, restore your trust in the integrity of our free institutions." Birnbaum v. U.S., No 76-1837 (E.D.N.Y., Aug. 17, 1977).

To a California psychiatrist, protecting an individual's right to privacy was worth spending three days in jail. Dr. George R. Caesar of Marin County refused to answer questions about the psychotherapy of one of his patients, in civil litigation she initiated to recover damages for two auto accidents. California law does not recognize patient-physician confidentiality when the patient commences civil litigation to which the psychotherapy relates. Caesar told the trial judge that to describe his patient's psychotherapy would result in harm to her.

That was in 1972. Ever since then he has been under the custody of the county sheriff, although not confined. A federal appeals court upheld the California law and this year the U.S. Supreme Court declined to hear the case. Caesar v. Mountanos, No. 76-804, cert. denied April 4, 1977. Although the judge could have sentenced the doctor for much longer, Dr. Caesar served a three-day sentence for criminal contempt. And his communications with his patient remain confidential.

The Church of Scientology has more than 20 lawsuits against federal agencies including one for as much as $750 million. But in a letter to the FBI, church attorneys have now complained of an invasion of members' privacy and demanded from the FBI damages of just $6. The Scientologists said they caught two FBI agents sneaking into a church movie presentation through a kitchen at the Los Angeles Hilton Hotel. And they want to recover the $3 admission charge for each intruder.

Agenda -- Sen. Birch Bayh, D-Ind., has scheduled hearings Sept. 27-28 of his Senate Subcommittee on the Constitution to consider his S. 1845, which would prohibit a company engaged in interstate commerce from requiring a polygraph test as a condition of employment, unless the individual requests such a test without coercion. PRIVACY JOURNAL publisher Robert Ellis Smith will testify.

The annual meeting of the Association of Records Managers and Administrators (P.O. Box 281, Bradford, R.I. 02808) will devote an all-day session on Oct. 3 to federal legislation affecting criminal justice information systems, Hyatt Regency Hotel, Houston (further information from Peter M. McLellan, Seattle Police Department, 206/625-4461). * * * The following institutions are offering a two-day seminar on computer auditing and security this fall: Franklin University, Columbus, Ohio (614/224-6237, ext. 40), Sept. 14-15; Pacific Lutheran University, Seattle (206/531-6900), Sept 26-27; Stevens Institute of Technology, Hoboken, N.J. (201/792-2700, ext 423), Sept 29-30; University of Maryland Center for Management Development, College Park, Md. (301/454-5237), Oct. 6-7; and State University of New York at Buffalo (716/831-3843), Oct. 25-26. * * * The National Bureau of Standards, Gaithersburg, Md. (301/921-3427) has scheduled a Personal Computing Conference, Nov. 28. * * * At the 49th annual meeting of the American Medical Record Association Rep. Barry M. Goldwater Jr., R-Calif., and privacy consultant Alan F. Westin will speak on the confidentiality of patient records Peachtree Plaza Hotel, Atlanta, Oct. 16-21 (more information from the association, 312/787-2672, 875 North Michigan Ave., Suite 1850, Chicago, Ill. 60611).

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In Germany -- The need for stricter controls was made clear to the data protection commissioner in the State of Hesse when he discovered that out-of-date computer printouts had been passed on to a nursery school for the kids to use as drawing paper. Trouble is, the printouts included sensitive registration data about individual citizens.

The commissioner's job, the first in the world, was established in Hesse in 1970 to monitor data collection about individuals. Now that the federal government in the Federal Republic of Germany has enacted privacy legislation, Hesse Commissioner Spiros Simitis has drafted model legislation for each Lander (state). Simitis would provide stricter consumer protections than the federal law, making any request for personal information voluntary unless authorized by a law on the books and imposing strict liability for any harm to an individual by computer managers. Simitis overseas a mandatory registry of data banks that provides Hessian citizens an opportunity to see who is using what information. The commissioner's annual report, with his draft law, is available from Der Hessische Datenschutzbeauftragte, Postfach 3163, 6200 Wiesbaden, West Germany. English summary of the report, plus Germany's federal privacy law affecting private and government data collection, is available for $12 from PRIVACY JOURNAL.

Simitis, a well-regarded university professor who has attacked the Hessian data protection problem with gusto, is expected to be named federal data protection commissioner, established by Germany's 1977 privacy law to oversee compliance with the law by federal agencies. His term is five years.

Among the Lawyers -- If you had criminal charges dismissed in the past and a new law passed since then allows you to expunge the record, your former attorney does not have an affirmative duty to inform you, according to a new ethics opinion from the American Bar Association. It is not unethical for the attorney to take the iniative and inform you of the change. Informal opinion 1356. * * * A lawyer should use due care to make sure that an outside data processing firm employed by him keeps client information confidential. Informal opinion 1364. * * * The American Bar Association has begun making its membership list of 220,000 lawyers available to "reputable mailers." Attorneys are given the option of removing their names from lists that will be rented.

Medical Records -- The Medical Society of New York, Blue Cross/Blue Shield, the nursing and dental associations, professional standards review organizations and other upstate New York groups have met together to form a corporation that will accredit data centers handling personally identifiable medical data, to assure that they meet certain standards. The effort is organized by the Joint Task Group on Confidentiality of Computerized Medical Records, 462 Grider St., Buffalo, N.Y. 14215. The Medical Society of New York has endorsed the idea. The State Health Department and the Health Insurance Association of America will also participate.

The Taxman's Files -- After the wholesale disclosure of tax returns during the Nixon Administration, critics of the Internal Revenue Service called it "the lending library." So, the Tax Reform Act of 1976 required the service to tighten its procedures for handing out personally identifiable taxpayer information. Now, there's evidence that the IRS is more like a leaky boat.

"IRS' security program does not assure confidentiality. Its security safeguards could easily be penetrated," the General Accounting Office, Congress' investigavative arm, says flatly in a report to the Joint Committee on Taxation. "Magnetic tapes, each containing tax data on as many as 5,000 taxpayers, were not properly controlled and some could not be properly accounted for." The GAO said the problem is not so much release of information to third parties, but the many opportunities for IRS employees to have access to taxpayer information they do not need to know. For instance, IRS has a data retrieval system which computerizes records on about ten percent of all U.S. taxpayers so that nearly 19,000 employees around the country can have instant access, via 4,000 display terminals, and can alter the recorded data. Security in this system has been lax and IRS has no way of controlling unauthorized access. IRS' Security Program Requires Improvements, GAO Report No. GGD-77-44, July 11, 1977 ($1 from GAO Distribution Section, P.O. Box 1020, Washington, D.C. 20013). Meanwhile, the IRS is asking Congress for $851 million to build a computer network with data on *all taxpayers* accessible through *8300 terminals*. Congress thus far has balked. An assistant tax comissioner said in response to complaints that the proposed system would threaten privacy, "We will learn from our experience with the old systems."

Mail Lists -- One federal agency will provide you a mail list of prospective purchasers of silver dollars, but the Bureau of the Mint, which also sells coins, regards the release of such a list an invasion of privacy (which means under federal law it need not be released). Government lists of business addresses are generally released, but various agencies have inconsistent policies with regard to release of individual addresses. Court decisions are also inconsistent, according to a General Accounting Office letter to Rep. Charles A. Vanik, D-Ohio, Aug. 25. The Privacy Act prohibits agencies from selling or renting mail lists, but the Freedom of Information Act requires disclosure of the lists unless to do so is "a clearly unwarranted invasion of personal privacy."

Just Published -- "The impersonality of the computer and the fact that it symbolizes for so many a system of uncaring power tend not only to incite efforts to strike back at the machine but also to provide certain people with a set of convenient rationalizations for engaging in fraud or embezzlement....Computer crime, to those who engage in it, is not like stealing a purse from an old lady," says a comprehensive two-part series on how and why computer systems are ripped off, "Annals of Crime," by Thomas Whiteside, The New Yorker, Aug. 22-29, 1977. The author, who wrote a definitive New Yorker piece on the consumer investigative industry, decribes the serious impact of criminal abuse of inventory, payroll, credit and financial systems.

Data Protection Legislation, edited by Dammann, Mallmann and Simitis (approximately $22 from Kluwer-Publisher, Lincoln Building, Suite 39, 160 Old Darby St., Hingham, Mass. 02043). This English-German book includes texts of the major federal laws and proposed legislation on data privacy in Europe and the U.S., compiled by the data protection commission in the German state of Hesse. Other 1977 publications in the same series on electronic data processing are Zielfunktionen des Datenschutzes (Functions of Data Protection, mainly in the credit field) by Otto Mallmann (147 pages, approximately $13) and Die Knotrolle des Datenschutzes (Institutional Control of Data Protection, concerning the use of oversight bodies to control information gathering) by Ulrich Dammann (200 pages, approximately $17).

Privacy and Security of Criminal History Information includes frequently asked questions and answers about the public's access to criminal history information in systems funded by the federal government (20 pages, free from National Criminal Justice Information and Statistics Service, Washington, D.C. 20531).

Johnny's Such a Bright Boy, What a Shame He's Retarded by Kate Long (361 pages, $10 from Houghton Miffin) decries the practice of labeling children based on their performances in school so that they remain in categories of retardation, impairment, dyslexia, etc., often in computerized information systems. * * * "Electronic surveillance does much harm and little good," says Taps, Bugs, and Fooling the People, by Herman Schwartz, a persuasive antidote to the 1976 report of the National Wiretap Commission (48 pages, free from The Field Foundation, 100 East 85th St., New York, N.Y. 10028). * * * The Data Processing Security Game, by Robert S. Becker of IBM General Systems Division, who says, "DP security is a game," the security administrator is analogous to a football coach who develops a strategy (103 pages, $5.95 from Pergamon Press, New York).

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